LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 3 1973
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-859

ELIZABETH ANN PETERS,
Petitioner,

vs.

LEWIS V. SMITH and CLEO SMITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES FOR THE SIXTH CIRCUIT

BOYD F. TAYLOR
HAMM, TAYLOR, MILBY & FARMER

P.O. Drawer "A"
London, Kentucky 40741

Attorneys for Petitioner

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2-3
Statement of the Case	3-5
Argument	5-11
Conclusion	11
Appendix	13-45
Complaint	13-16
Motion to Dismiss	17-18
Motion to Transfer	19-20
Order of Transfer	21-22
Motion to Quash	23-24
Opinion of District Court	25-30
Judgment of District Court	31-32
Opinion of Court of Appeals	33-41
Order on Petition for Rehearing	42-44
Proof of Service	45

AUTHORITIES CITED

Cases:	Page
Erie Railroad Company v. Tompkins, 304 U.S. 64	6, 7
Groninger v. Davison, 334 Fed. 2d 638	5, 7, 9
Guaranty Trust Company v. York, 326 U.S. 99	6, 7
Hanna v. Plummer, 380 U.S. 460	5, 6, 7, 8, 9, 10
Jeffcoat v. Donovan, 135 Fed. 2d 213	10
Ragan v. Merchants Transfer and Warehouse Company, 337 U.S. 530	5, 6, 7, 8, 9
Sylvester v. Messler, 246 Fed. Supp. 1	5, 7, 8
Thomson v. Gaskill, 315 U.S. 442	10

Statutes:	
Kentucky Revised Statutes 413.140	2
Kentucky Revised Statutes 413.250	3
Kentucky Revised Statutes 413.270	3

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. ————

ELIZABETH ANN PETERS,
Petitioner,

vs.

LEWIS V. SMITH and CLEO SMITH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES FOR THE SIXTH CIRCUIT

MAY IT PLEASE THE COURT:

The Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the Court of Appeals of the United States for the Sixth Circuit.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is printed in the Appendix, infra, pp. 33 to 41. It reversed the judgment of the United States District Court for the Eastern District of Kentucky, which is printed in the Appendix, infra, pp. 25 to 30. The opinion has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was dated and entered on August 7, 1973, and the order denying the petition for rehearing which is printed in the Appendix, infra, pp. 42 to 44, was dated and entered on September 5, 1973. The jurisdiction of this Court rests upon Title 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. In a diversity of citizenship case by a Michigan citizen against a Kentucky citizen arising out of an accident occurring in Kentucky, the filing of a Complaint in a Michigan District Court does not toll the running of the Kentucky statute of limitations when process issued by the Michigan District Court was unauthorized and the Kentucky citizen was not served with valid process until after the expiration of the Kentucky statute of limitations.
2. In a case founded solely upon diversity of citizenship a United States District Court acquires no jurisdiction to hear and determine matters where the complaint is fatally defective as to jurisdictional allegations.

STATUTES INVOLVED

Kentucky Revised Statutes, Chapter 413.140 (1) (a) provide in pertinent part as follows:

"413.140 Actions to be brought within one year.

(1) The following actions shall be commenced within one year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant."

"413.250 When action commences.

An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action."

"413.270 Effect of judgment of no jurisdiction; application to administrative agencies.

(1) If any action is commenced in due time and in good faith in any court of this state and the defendants of any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

(2) As used in this section, 'court' means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America."

STATEMENT OF THE CASE

On June 11, 1968, an automobile accident occurred in London, Kentucky, involving the Petitioner, a citizen and resident of Kentucky, and the Respondents, citizens and residents of the State of Michigan.

On June 9, 1969, the Respondents filed a complaint, Appendix, infra, pp. 13 to 16, in the United States District Court for the Southern District of Michigan against the Petitioner seeking damages for personal injuries, prop-

erty damages and loss of services. The process issued from the District Court of Michigan was directed to the United States Marshal for the Eastern District of Kentucky and there served by him on the Petitioner on April 28, 1971.

The only allegations in the Respondents' complaint upon which to ground federal jurisdiction is contained in paragraph 1 Count I:

> "Plaintiffs Lewis V. Smith and Cleo Smith, his wife, are residents of the State of Michigan and defendant, Elizabeth Ann Peters is a resident of the State of Kentucky. Further that the amount in controversy exceed Ten Thousand ($10,000.00) Dollars."

It must be assumed that the Respondents attempted to invoke federal jurisdiction pursuant to U. S. C. A. Title 28 Sec. 1332.

The Petitioner filed a motion, Appendix, infra, pp. 17 and 18 to dismiss the complaint upon the grounds that the District Court of Michigan was without jurisdiction. The Respondents filed a motion to transfer, Appendix, infra, pp. 19 and 20, the case from the District Court of Michigan to the District Court for the Eastern District of Kentucky pursuant to U. S. C. A. Title 28 1404 (a).

On June 29, 1971, the District Court of Michigan entered an order, Appendix, infra, pp. 21 and 22, transferring the case to the Eastern District of Kentucky, "in the interest of justice".

After the transfer, the Respondents caused another summons to issue from the Eastern District Court of Kentucky on August 3, 1971, which was served on the Petitioner in the Eastern District of Kentucky on August 10, 1971.

After service of the last summons, the Petitioner filed her second motion to dismiss, Appendix, infra, pp. 23 and 24.

In an opinion, Appendix, infra, pp. 25 to 30, and judgment, Appendix, infra, pp. 31 and 32, entered on May

24, 1972, the Kentucky District Court sustained the Petitioner's motion to dismiss. A timely appeal was taken to the United States Court of Appeals for the Sixth Circuit which reversed the District Court in an opinion and judgment dated and entered on August 7, 1973. On September 10, 1973, the Court denied the Petitioner's petition for rehearing, Appendix, infra, pp. 42 to 44.

The Petitioner is now here asking this Court to grant certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

ARGUMENT

The Petitioner urges this Court to grant certiorari to resolve the conflict in the decisions of the Court of Appeals for the Eighth Circuit in the case of *Groninger* v. *Davison,* 334 Fed. 2d 638 and the decision of the Court of Appeals for the Sixth Circuit in the instant case. In addition the decision for the Court of Appeals for the Sixth Circuit in the instant case is contrary to its previous decision in the case of *Sylvester* v. *Messler,* 246 Fed. Supp. 1, 351 Fed. 2d 742, Cert. denied 382 U.S. 1011.

The conflict emanates from this Court's decisions in the cases of *Ragan* v. *Merchants Transfer and Warehouse Company,* 337 U.S. 530, and *Hanna* v. *Plummer,* 380 U.S. 460.

In *Ragan,* the plaintiff filed a complaint in the District Court of Kansas seeking damages arising out of a highway accident that occurred on October 1, 1943. The Kansas statute of limitations with respect to tort claims was two years. Service was had on the defendant on December 28, 1945. The Kansas statute provided:

> "An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served upon him . . . ."

The defendant plead limitations which was overruled by the District Court. The plaintiff argued that the filing of the complaint in conformity with Rule 3 of the Federal Rules of Civil Procedure and service in accordance with Rule 4 (d) (1) toll the running of the Kansas statute of limitations. The District Court overruled the plea of limitations and on appeal the Court of Appeals for the Tenth Circuit reversed, 170 Fed. 2d 987, and held the requirement of service of summons within the statutory period was an integral part of the Kansas statute of limitations and that the plea of limitations should have been sustained. This Court sustained a petition for certiorari and in an opinion by Mr. Justice Douglas the decision of the lower Court was affirmed. In *Ragan* this Court reviewed *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, and *Guaranty Trust Company* v. *New York,* 326 U.S. 99, and concluded that if an action was barred under the state law it would also be barred under the federal law and that the Kansas statute of limitations was not tolled by the filing of the complaint in the District Court and obtaining process pursuant to Rule 4 (d) (1), Federal Rules of Civil Procedure.

In 1965, this Court decided *Hanna* v. *Plummer,* 380 U.S. 460. In *Hanna,* the plaintiff, an Ohio citizen, filed a complaint in the District Court of Massachusetts against the defendant, a citizen of Massachusetts who was the executor of the estate of the deceased tort feasor. Process was issued and served pursuant to Rule 4 (d) (1), Federal Rules of Civil Procedure. Massachusetts had a statute requiring: "in hand" delivery of summons to an executor or administrator within one year. Service was had by leaving a copy of the summons with the defendant's wife two days after the statute of limitations had expired. The District Court granted summary judgment on the plea of limitations based on the authority of *Ragan,* supra, and

Guaranty Trust Company, supra. On appeal to the Court of Appeals for the First Circuit, the District Court's judgment was affirmed. This Court granted certiorari and again reviewed its previous decisions in *Erie, Guaranty Trust Company* and *Ragan.* In an opinion by Mr. Chief Justice Warren, this Court reversed the First Circuit and held that the provisions of Federal Rule 4 (d) (1) were controlling over the provisions of the Massachusetts statute of limitations. The result reached in *Hanna* is obviously out of harmony with *Ragan,* however, this Court very carefully refrained from overruling *Ragan.*

In 1964, the District Court for the Eastern District of Michigan decided the case of *Sylvester* v. *Messler,* 246 Fed. Supp. 1. The accident giving rise to the cause of action occurred in Florida on February 17, 1961. The complaint was filed on February 14, 1964. Process was placed in the hands of the United States Marshal on March 12, 1964. The Michigan statute of limitations was three years. The District Court dismissed the action on the authority of *Ragan,* supra. While the case was on appeal to the Sixth Circuit, this Court decided *Hanna,* supra. At the oral argument and by supplemental briefs this Court's decision in *Hanna,* supra, was brought to the attention of the Court of Appeals for the Sixth Circuit. In a per curiam opinion, 351 Fed. 2d 472, the Court of Appeals for the Sixth Circuit considered *Ragan* and *Hanna* and concluded that *Ragan* was controlling and refused to apply *Hanna.* Certiorari was denied by this Court in 382 U.S. 1011.

In 1966, the Court of Appeals for the Eighth Circuit decided *Groninger* v. *Davison,* 364 Fed. 2d 638. In *Groninger,* the plaintiff filed an action in the District Court of Iowa on March 1, 1965, arising out of an accident occurring in Iowa on March 2, 1963. Iowa had a two year statute of limitations. Summons was delivered to the United States

Marshal on March 4, 1965 and served on the defendant on March 4, 1965. Rule 48 of the Iowa Rules of Civil Procedure provided:

> "A civil action is commenced by serving the defendant with an original notice."

The District Court granted summary judgment based on a plea of limitations. On appeal the Eighth Circuit affirmed after very carefully reviewing *Ragan,* supra, and *Hanna,* supra, *Sylvester* v. *Messler,* supra, and other authorities. The opinion of the Eighth Circuit concluded with the following:

> "While it is difficult to reconcile Hanna v. Plummer, supra, with the holding in Ragan, we nevertheless must conclude that the majority of the Supreme Court, in supporting the opinion written by the Chief Justice, felt that it was not an overruling of Ragan. Until the Supreme Court itself overrules its very positive statements in Ragan, the lower Courts must follow its holdings. This case is affirmed."

From the foregoing, the Petitioner urges the Court to grant certiorari for the following reasons:

(1) The decision of the Court of Appeals for the Sixth Circuit in the instant case is in hopeless conflict with its own decision in *Sylvester* v. *Messler,* supra. This is apparent by the Court's own statement in its order denying the petition for rehearing, Appendix, infra, p. 44, as follows:

> "To the extent that our decision conflicts with *Sylvester* v. *Messler, supra,* we decline to follow it."

(2) The decision of the Court of Appeals for the Sixth Circuit is in hopeless conflict with the decision of the Court

of Appeals of the Eighth Circuit in *Groninger* v. *Davison*, supra.

(3) The conflict between *Ragan*, supra, and *Hanna*, supra, should be resolved for the reasons clearly stated by Mr. Chief Justice Warren in the course of the *Hanna* opinion in which he stated:

> "Because of the threat to the goal of uniformity on Federal procedure posed by the decision below, we granted certiorari. . . ."

It will be observed that in all the cases cited herein the defendant was amenable to the process of the District Court because the actions were filed in the districts of the residence of the defendants and the District Courts could acquire personal jurisdiction of the defendants. Moreover no transfer from one district to another was involved.

In all the authorities cited herein, the principle of law involved is precisely the same and no distinction of a substantial nature can be made. If the doctrine of *Ragan* is still viable, clearly the decision of the Court of Appeals for the Sixth Circuit in the instant case is erroneous and certiorari should be granted. Even under the doctrine of *Hanna*, the decision of the Court of Appeals for the Sixth Circuit is erroneous because it goes far beyond *Hanna* in that the District Court of Michigan did not and could not acquire jurisdiction of the Petitioner. Moreover, an action filed by a Kentucky citizen in the District Court of Kentucky at the time of the transfer and valid service of process would not have been timely. Consequently, the decision of the Court of Appeals for the Sixth Circuit in the instant case grants to the Respondents a privilege which would be denied the Petitioner, a citizen of Kentucky, under the laws of Kentucky. This denies the Petitioner equal protection of the laws and defeats the policy of uniformity

as announced by Mr. Chief Justice Warren in *Hanna,* supra.

The remaining question presented concerns the sufficiency of the allegations of the complaint as to Federal jurisdiction. The allegations in this respect are as follows:

> "Plaintiffs Lewis V. Smith and Cleo Smith, his wife, are residents of the State of Michigan and defendant, Elizabeth Ann Peters is a resident of the State of Kentucky. Further that the amount in controversy exceed Ten Thousand ($10,000.00) Dollars."

Under Title 28, 1332 (a) (1) Federal jurisdiction is grounded on civil actions where the amount in controversy exceeds $10,000.00 "exclusive of interest and cost" and is between "citizens" of different states. The complaint alleges the parties are "residents" of Michigan and Kentucky and the amount in controversy exceeds $10,000.00. It does not allege that the amount of $10,000.00 is "exclusive of interest and costs".

In the case of *Thomson* v. *Gaskill,* 315 U.S. 442, this Court held the policy of the statute conferring diversity jurisdiction upon the District Court calls for its strict construction.

In the case of *Jeffcoat* v. *Donovan,* 135 Fed. 2d 213, the Court of Appeals for the Ninth Circuit held that an allegation that plaintiff was a "resident" of one state and that the defendant was a "resident" of another state fails to show diversity jurisdiction. The Petitioner recognizes that the defective allegations could have been cured by an amendment, however, no amendment was ever filed even though the Petitioner raised the point in the District Court and in the Court of Appeals. Since the defect was brought to the attention of the Respondents, it must be presumed that the Respondents were willing to stand on the sufficiency of the complaint or else they would have amended

the complaint. It is the contention of the Petitioner that until the complaint is amended, the District Court of Michigan as well as the District Court of Kentucky and the Court of Appeals for the Sixth Circuit never acquired jurisdiction of this controversy.

For the reasons herein stated, this Court should grant certiorari.

All of which is respectfully submitted.

BOYD F. TAYLOR
HAMM, TAYLOR, MILBY & FARMER

P. O. Drawer "A"
London, Kentucky 40741

Attorneys for Petitioner